85-1112

No. ———

Supreme Court, U.S.
FILED
DEC 30 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

FALSTAFF BREWING CORPORATION,
Petitioner,

v.

TRINITY CARTON COMPANY, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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December 30, 1985

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QUESTIONS PRESENTED

Whether the Court should assert its supervisory powers to protect the integrity of the federal judiciary system, and to carry out the mandate in Rule 1 of the Federal Rules of Civil Procedure (that the Rules shall be construed to secure the just determination of every action), in the case of the following errors:

1. Despite the clear mandate of Fed.R.Civ.P. 15(b) (that unpleaded issues tried by consent of the parties shall be treated as if pleaded), the trial court refused to treat as if pleaded an issue on which both parties litigated and presented evidence, both parties requested jury instructions, and both parties objected to the trial court's refusal to give the respective requested instructions.

2. The verdict was fatally flawed because the trial court's failure to specifically instruct the jury on a major factual issue created so much confusion that it was impossible to know whether the jury decided that factual issue and made it improbable that it did.

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Petitioner Falstaff Brewing Corporation respectfully urges this Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, issued August 5, 1985, is reported at 767 F.2d 184 (5th Cir. 1985) and is reprinted in the Appendix. That court's order denying rehearing, issued September 30, 1985, is also reprinted in the Appendix.

JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit was issued on August 5, 1985 and Petitioner timely sought rehearing. The petition for rehearing was denied on September 30, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Rule 1. Scope of Rules

"These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. *They shall be construed to secure the just, speedy, and inexpensive determination of every action.*" Emphasis added.

Rule 15(b) Amendments to Conform to the Evidence.

"When issues not raised by the pleadings are tried by express or implied consent of the parties, *they shall be treated in all respects as if they had been raised in the pleadings.* Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and *shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him* in maintaining his action or defense upon the merits. The court may grant a continuance to enable the The court may grant a continuance to enable the objecting party to meet such evidence." Emph. added.

STATEMENT OF THE CASE

In 1964, Petitioner Falstaff Brewing Corporation (defendant below) operated a brewery in New Orleans. It needed to build a can-handling plant, and there was a suitable parcel of land next door, owned by the Broad Street Corporation (landowner), and leased to the Respondent Trinity Carton Company (plaintiff below), and

then unused. Falstaff and Trinity agreed that Falstaff would sublease for a 25-year duration approximately one-third of the Broad Street parcel (which we will call Part A of the Broad Street parcel). The parties signed a written sublease. Falstaff then built its can-handling plant on Part A.

Approximately five years later, Falstaff expressed an interest in subleasing the remaining two-thirds of the Broad Street parcel (which we will call Part B), and commenced discussions with Trinity about the price. A building was located on the property, and as Trinity itself admitted, it was "in a bad state of repair and was in poor condition unsuitable for occupancy . . . ." Complaint par. V. Initially Trinity demanded $1.20 per square foot, far more than the going market value for this dilapidated property across the street from the local jail.

As Trinity well knew, it was Falstaff's plan to tear down the unuseable building and erect a can manufacturing plant. Falstaff needed a 30-year sublease to properly amortize the new plant. Although the parties did not discuss this, Trinity knew about Falstaff's plans. Both parties also knew that Trinity's own lease with the landowner, Broad Street, required that the latter approve in writing any demolition and new construction before such actions were undertaken.[1]

In April, 1970, the parties finally reached agreement on the amount of rent for Part B; it was to be 65¢ per square foot (about $57,000 per year). Trinity's attorney asked that this offer be put in writing and Falstaff's

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[1] The applicable lease provision read: "Lessee [Trinity] shall have the right to demolish any portion of the present improvements, provided Lessee builds, at his expense, any improvements thereon that are comparable or better insofar as the appearance, construction and utilitarian value are concerned. Demolition and erection of improvements are to be approved by Lessor [Broad Street], in writing, prior thereto."

attorney complied. In his letter, Falstaff's attorney confirmed the 65¢ per square foot offer for Part B, and also made reference to the only other matter about which the parties had so far reached agreement in their discussions: Falstaff's purchase of Trinity's trash baler for $10,000. No other terms or conditions were recited in the letter, although the duration of the sublease and permission to demolish were terms still to be negotiated.

Trinity responded with a telegram accepting Falstaff's offer, and concluding, "Await review of lease if prepared by you." [2]

Falstaff was not yet ready to draft the new sublease, however, because the duration of it and Broad Street's written assent to demolition remained to be agreed to (although Falstaff did not anticipate any problem on this score).

Immediately following agreement on the price, Falstaff instructed its New Orleans attorney to clear with Broad Street the demolition of its old building on Part B, and to negotiate a 30-year lease to the entire parcel—Part A as well as Part B. (Broad Street's concurrence to a 30-year term was needed because Trinity's own lease to Parts A and B had only 18 years remaining; Falstaff

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[2] Falstaff's letter of April 14, 1970, read (in pertinent part):

> "Confirming our telephone conversation yesterday, Falstaff will take a sublease from Trinity Carton Company of all the property heretofore leased from Broad Street Corporation by Trinity Carton Company other than the property heretofore subleased to Falstaff. The rental offered is $.65 per square foot net.
>
> * * * *
>
> "In the event your people decide to accept this proposal, we would like to move immediately on the consummation of the transaction."

Trinity's telegram dated April 20, 1970, read:

> "Terms of lease outlined in your letter of April 14th 1970 are acceptable to Trinity. Await review of lease if prepared by you."

assumed that Broad Street would be only too glad to extend the master lease.)

Falstaff's New Orleans attorney, in good faith, presented detailed information about its building plans to Broad Street and requested clearance. Broad Street's principal, apparently assuming Falstaff had no choice but to rent Part B because of its proximity to Falstaff's existing brewery, demanded a payment of $241,000 as the price of permission to demolish the dilapidated building on Part B, asserting that the building held that value as a depreciation tax deduction.[3] Falstaff's principal, incensed at this blatant attempt to introduce an extortionate and unacceptable new price element into the sublease negotiations, immediately withdrew from any further consideration of a sublease of Part B. It so informed Trinity of this fact, citing the unreasonable Broad Street demand as the reason for its withdrawal.

Falstaff believed this ended the matter: the fundamental permission from the landlord to demolish had been denied, and so there was no deal. The question of duration of the sublease was never negotiated. Falstaff then made other arrangements elsewhere in the city for its can manufacturing plant.

Trinity, however, now faced the prospect of another long period of holding Part B unrented, which with the old building on it was a white elephant in an already run-down part of the city. In a letter to Falstaff's counsel, Trinity asserted that the parties had made a binding sublease of Part B, commencing June 1, 1970, with a price of 65¢ per square foot and otherwise embracing

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[3] Broad Street's stated reason was spurious. It would have been entitled to claim as a loss the adjusted basis of the demolished building, increased by the net cost of demolition and decreased by the net proceeds therefrom. *Mertens Law of Federal Income Tax*, § 28.22a(b) (1980). Demolition was thus a *benefit*, not a burden, to the owner.

all other terms and conditions of the 1964 sublease to Part A. Falstaff, by return letter, emphatically denied that any sublease to Part B had been created because the demolition approval had been refused. Without the ability to demolish and build, Falstaff could not make use of Part B. Thus, Falstaff made no attempt to occupy the premises or in any way to assert dominion over them.

Trinity, however, almost immediately after June 1, 1970—the date on which the alleged sublease term was to commence—began to renovate the crumbling old building on Part B and actively solicited subtenants. Parts of Part B were subleased early in 1971.

Three years later, in December, 1973, Trinity, apparently dissatisfied with its success in subleasing Part B, filed a diversity suit against Falstaff in United States District Court for the Eastern District of Louisiana asserting that a binding oral lease existed. It claimed accelerated rents for 18 years through December 31, 1988 (the date on which Falstaff's 1964 sublease to Part A expires), together with taxes, insurance, utilities, costs of repair of the dilapidated building, interest and a 10% attorney fee, although Falstaff had never occupied the premises.

The Court ordered a bifurcated trial: the issue of liability was to be tried to a jury while the quantum of damages was to be determined by a magistrate. The two-day jury trial was held November 8 and 9, 1976.

Falstaff presented evidence to demonstrate that consent to the agreement had not been achieved by the parties: most significantly, there was no agreement as to the duration of the sublease, and the permission to demolish the existing building, upon which the offer to lease was conditioned, had not been acquired. Falstaff further argued that the parties had not intended to be bound until a complete agreement had been reduced to writing. These issues were in the pretrial order of October 22, 1974, par. B.

Trinity argued that other than the 65¢ per square foot rental rate, the parties had intended to use in the proposed Part B sublease all the provisions in the Part A sublease (which Falstaff concedes was true for all the boilerplate provisions but certainly not for the duration and demolition points).

Falstaff requested jury instructions on several issues, including the question whether an agreement between the parties was created or any obligation under an agreement commenced without the acquisition of the landlord's (Broad Street's) permission to demolish, upon which Falstaff's consent to the sublease was conditioned. The district court refused to give these instructions on the ground that Falstaff had not pleaded Condition as an affirmative defense. Trinity's request for an instruction on condition was likewise refused. Both parties objected to the trial court's refusal of their instructions.

The issue of duration of any sublease did not come up. Falstaff's intention always had been to obtain a 30-year duration of any sublease since that length of time was needed to amortize the planned building.[4] Neither Falstaff nor Trinity requested, nor did the Court give, any instruction to the jury on the question of the duration of the alleged sublease. This was appropriate, because the issue of duration did not under Louisiana law have to be decided as an element of consent—*i.e.*, as a liability issue. Louisiana law says that if there is no agreement on duration, the duration is supplied by law—month-to-month.

The trial judge apparently never thought of the duration issue, and said nothing specific on it. He told the jurors they had but one job to do:

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[4] *See* April 23, 1970 letter from Falstaff's St. Louis counsel to Falstaff's New Orleans counsel (Joint Exh. 11): ". . . what is needed is a 30-year lease on the entire property, at the net rental of 65¢ per square foot on the additional property to be leased, and 60¢ per square foot on the property now under lease to Falstaff. . . ."

> "You will decide now only whether the defendant, Falstaff, is liable to the plaintiff, Trinity; that is, whether they entered into a binding agreement of sublease. *Any further issues in this case will be tried separately at another time.*" (Emphasis added.) App. at 33a.

The jury returned a general verdict in favor of Trinity, meaning that it believed there was a sublease, but not necessarily that it had found how long the sublease was to last.

On the issue of Condition, Falstaff, in keeping with its theory of the case, then moved to amend its answer to add the defense of non-occurrence of a condition precedent, in light of the district court's refusal to instruct the jury on the issue. The district court denied the motion without any explanation, and the case went to the second stage of the trial—the trial on damages before a magistrate.

Serious confusion about the duration point surfaced during the magistrate's damages proceedings, when the question arose as to how many months' rent Falstaff owed. Falstaff pointed out that under Louisiana law, unless the duration was specified by the parties, the alleged sublease would be month-to-month, La. Civ. Code Ann. art. 2685 (West 1952), and terminable at any time, and in fact had been terminated in writing by Falstaff.

It is apparent from the record of the damages trial that the magistrate was not initially clear as to whether the length of term was an issue before him. His confusion on this point apparently prompted him to explore the question because during the trial he informed counsel for Falstaff that he had been "advised" that he was not to consider the length of the sublease, *as it had already been decided that the duration was 18 years.* The on-the-record colloquy between counsel and magistrate shows the latter's reluctance to expressly identify the source of the "advice" or to reveal whether the decision had been made by the trial judge or by the jury. The dialogue

suggests that it was the trial judge who must have privately instructed the magistrate on the matter.[5] The record contains no communication from the judge to the magistrate that the term of the sublease was to be 18 years or any other term.

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[5] The following exchanges took place between Falstaff's counsel and the magistrate:

> MR. MOLONY [Falstaff counsel]: We had always assumed that part of the trial was to determine damages—
>
> MAGISTRATE: And the damages included the length of the lease, if any.
>
> MR. MOLONY: Right, liability was the only thing the jury was charged on. They found it. Now, we're in the trial on damages, and, now, what you're telling me is that the District Judge has removed from this part of the trial the biggest issue of damages, the term.
>
> MAGISTRATE: Well, not necessarily adopting your words, but, yes, in essence.
>
> Rec. Vol. V, p. 124, line 21 through p. 125, line 14.
>
> * * * *
>
> MAGISTRATE: I'm still bound by the instructions I am given, and that I am not to consider the length of the term that has already been decided.
>
> MR. MOLONY: By the jury?
>
> MAGISTRATE: At least at this level.
>
> MR. MOLONY: By the jury or by Judge Cassibry?
>
> MAGISTRATE: What I'm saying is that I don't even explore that, to who made the determination. O.K. Let me say this: I'd be happy to discuss it with you over coffee, but we're already reaching the point where I can't say anything more than what I've said.
>
> Rec. Vol. V, p. 126, lines 3-24.
>
> * * * *
>
> MAGISTRATE: I was advised that I am not to consider the term of the lease, the term of the lease has been established and it is to be superimposed on the, what we shall call the 1964 lease between Trinity and Falstaff.
>
> Rec. Vol. VI, p. 119, lines 5-19.

The difficulty with an 18 year duration, of course, was that (1) the jury had never been given that issue, and (2) an 18 year duration was an anomaly clearly never agreed upon. Trinity's theory was that the parties had agreed to the same terms as in the sublease to Part A. But that made no sense because the Part A duration was 25 years, not 18, and even this was less than the 30 years that the uncontroverted evidence showed that Falstaff wanted. Opening up the question of duration served only to prove that the parties had never agreed upon it (hence under Louisiana law it was month-to-month).

Although the magistrate felt instructed to accept the duration as 18 years, he nevertheless avoided the shocking conclusion that Falstaff owed Trinity 18 years' rent. He found that Trinity was entitled to zero damages because it had breached the sublease by failing to deliver the premises to Falstaff at the commencement date of the sublease (instead, Trinity had elected to renovate the premises and let them to others).

The district court rejected the zero damages finding and sent the matter back to the magistrate, characterizing the basis for the magistrate's findings (breach of sublease by Trinity) as a "liability issue that was not submitted to the jury because it was not raised by the defendant." The judge ordered the magistrate to recalculate the quantum of damages.

The chastened magistrate, after a year of deliberations and over Falstaff's objections, dutifully calculated rents on the basis of the fictitious 18-year lease term.

The magistrate returned his second findings and recommendations on May 6, 1982; he assessed damages against Falstaff in the amount of $1,011.913.33 for accelerated rents, taxes, utilities, insurance, and attorneys fees, less rental income Trinity received from its subtenants. The district court accepted these recommenda-

tions, but added to the damages total Trinity's costs of renovation of the dilapidated building prior to re-leasing it to subtenants. This plus interest and other items have brought the total claimed by Trinity to $3,492,000 for a parcel never used by Falstaff.

Falstaff timely appealed to the United States Court of Appeals for the Fifth Circuit. It challenged, *inter alia*, the district court's refusal of its requested jury instructions and denial of its motion to amend its answer both with regard to the issue of Condition, and the extra-judicial finding of an 18-year duration to the sublease. The Court of Appeals rejected Falstaff's challenges and affirmed the district court.[6]

REASONS FOR GRANTING THE WRIT

This case presents one of those rare instances where the judicial process has produced such a miscarriage of justice at both trial and appeal that the integrity of the process requires this Court's intervention. If allowed to stand, the decision of the Fifth Circuit Court of Appeals will result in the Falstaff Brewing Corporation being forced to pay nearly $3.5 million in rents, costs of renovating Broad Street's dilapidated building, and other costs for premises it never unconditionally agreed to lease, never occupied and cannot now occupy, and for which it has no use.

This case has reached this irrational result through the trial court's failure to instruct the jury on two major elements of petitioner's case: the matter of Condition (right to demolish) and lease duration. These failures should have been recognized as reversible errors by

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[6] The respondent, Trinity, cross-appealed the trial court's failure to award it $10,000 for the trash baler it asserted Falstaff had agreed to purchase. Finding that Falstaff was obligated for the baler, the appellate court reversed the lower court on this issue. In all other respects, the trial court was affirmed.

the Court of Appeals. In the exercise of its supervisory powers over the administration of justice in the federal courts, *see, e.g., Theil v. Southern Pacific Co.*, 328 U.S. 211, 225 (1946), this Court should grant the writ in order to reverse the judgment below and remand the case for a new trial.

1. The Issue of Condition Was Tried by Consent.

The trial court rejected Falstaff's proffered jury instructions on the implied condition precedent to its agreement—the acquisition of permission to demolish from the landowner (Broad Street). Similarly, the court denied Falstaff's motion to amend its answer, filed shortly after the jury verdict (and over a year prior to the trial on quantum) to assert the defense of non-occurrence of the condition precedent even though the condition had been mentioned in the pretrial order (Oct. 22, 1974, para. B. (3)), and had been tried by both parties.

The Court of Appeals refused to find error in the trial court's rejection of the jury instruction because Falstaff had not specifically and particularly pled the non-occurrence of the condition, as required by Fed.R.Civ.P. 9(c), App. at 13a; however, one does not have to specifically plead the defense of condition when that issue was in fact tried by consent with the full knowledge of both parties. Fed.R.Civ.P 15(b) says that issues tried by implied consent shall be treated as if pleaded. Throughout this case, before trial as well as after, Falstaff has argued that the landowner's (Broad Street's) consent to its building plans was a fundamental element of its agreement to sublease; it presented both documentary and testimonial evidence of this at trial. Trinity has consistently argued against this Falstaff assertion, and presented its own evidence to support its position on the issue. Where an issue is tried by consent, a jury instruction should be given concerning it and a failure to do so is an abuse of the court's discretion. *Slavitt v. Kauhi*, 384 F.2d 530 (9th Cir. 1967).

The Court of Appeals, however, dismissed the contention that this issue should be deemed to have been tried by consent, because, it said, "the question of condition was litigated within the framework of the issue of consent [to the sublease]." App. at 14a. While the court asserted the correct principle—"trial by consent may not be deemed where evidence concerning the issue that is maintained to have been thusly tried is also relevant to other issues that in fact have been pleaded and tried, at least in the absence of clear notice that such issue was being raised," *id.*—that principle has no application to this case.

As noted, the record clearly demonstrates that both parties litigated the issue of Condition. Furthermore, the Court of Appeals overlooked the fact that *both* parties submitted requested instructions on the question—all of which were refused by the trial court—and counsel for *both* parties vigorously objected to the refusal. App. at 39a, 40a. The issue was also mentioned in the pretrial order. Obviously Trinity had "clear notice" that the issue was raised.

While the Court of Appeals asserted that an issue may not be deemed to be tried by consent where prejudice to the other party would result, App. at 15a, it did not identify any prejudice whatever that Trinity would have suffered had the trial court given instructions on the issue. Obviously there was no prejudice, as Trinity itself asked that the jury be instructed on the issue.

The trial court also denied Falstaff's motion after the verdict to amend its answer to add condition precedent as a Third Defense. No justification for the denial was given. Rule 15(b) of the Federal Rules of Civil Procedure dictates that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they *shall* be treated in all respects as if they had been raised in the pleadings." (Emphasis supplied.) That Rule

further provides that amendments to the pleadings to conform them to the evidence may be raised by motion at any time, even after judgment. Refusal of a trial court for leave to amend under such circumstances is error. *Hopkins v. Metcalf*, 435 F.2d 123 (10th Cir. 1970).

In its affirmance of the trial court's denial of the motion to amend to add the defense of condition, the Court of Appeals applied the incorrect standard of review. It treated the matter as one reviewable under the abuse of discretion standard set out in *Foman v. Davis*, 371 U.S. 178 (1962), the standard generally applied to motions to amend offered after expiration of the amendment-of-right period allowed by Rule 15(a).[7] The court held that the trial judge did not abuse his discretion in denying the motion, asserting that Falstaff had unduly delayed in seeking to amend the pleadings. App. at 18a.

Since the issue of condition was tried by consent, the reviewing court should have applied the mandatory language of Rule 15(b) rather than the discretionary standard of Rule 15(a). Once it is determined that an issue has been tried by consent, the trial court, under Rule 15(b), has no discretion to deny a motion to amend. *Metropolitan Life Ins. Co. v. Frugate*, 313 F.2d 788, 795 (5th Cir. 1963); *Bradford Audio Corp. v. Pious*, 392 F.2d 67, 73-74 (2d Cir. 1968).

This Court's supervisory powers over the administration of justice in the federal courts should be exercised to correct this failure to follow the dictates of Rule 15(b).

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[7] Rule 15(a) provides (in pertinent part): "A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served."

2. The Trial Court's Failure to Instruct on Lease Duration Meant that that Question Could Not Be Deemed Decided by the Jury.

The trial court gave no instruction to the jury on whether or to what extent it had a responsibility to decide the *duration* of the alleged sublease between Falstaff and Trinity, if it found such a sublease to exist. In fact, nowhere in his charge to the jury did the judge even mention that a major factual disagreement existed between the parties on the question of sublease duration. The jury was uninstructed on the issue, and would have had no way to know that they were expected to find anything on that issue.

The Court of Appeals found a way around this deficiency. It held that since the jury's general verdict was returned for Trinity, a general reference in the trial court's instructions to the non-price provisions of the Part A sublease was sufficient to support the conclusion that the jury found the parties intended to create an 18-year sublease of Part B.[8] But from the facts recited above, it is virtually certain that the jurors did not even address the question of duration during their deliberations, and that they assumed the main question for their decision was whether the parties' agreement on the price of Part B meant there was a basic sublease, with the question of duration, if it even occurred to them, being a "further issue" to be "tried separately at another time."

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[8] This referred to the trial court's mention in general terms of Trinity's argument: "Trinity contends that consent [to the Part B sublease] was given, because the price and the thing, the premises to be subject to the lease, were agreed upon, and it was agreed and understood that *the additional terms would be the same as those in the 1964 sublease.*" App. at 31a. (Emphasis added.) There is no indication that the trial court was thinking *at this time* of the special issue of duration, which by its nature could not be implicitly carried over to the Part B alleged sublease without express negotiated agreement on *same* term of years.

If the jury did not decide the duration issue, then there was no basis for the trial court to tell the magistrate privately that the duration was 18 years.

It is apparent from this recitation that there was no understanding among the judge, counsel, magistrate and the empaneled jury as to when in the bifurcated trial the question of duration was to be addressed. There was no sharp line between liability and damages issues, illustrating the wisdom of the maxim that when the separate trials procedure is used, it "must be grounded upon a clear understanding between the court and counsel of the issue or issues involved in each phase and what proof will be required to pass from one phase to the next." *Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307, 1324 (5th Cir. 1976).

The significance of a finding on duration is critical. If the jury made *no* decision on the question of duration, then the finding it did make—that the parties entered into a binding oral sublease—would trigger application of La. Civ. Code art. 2685. That code provision sets out Louisiana's recognition of leases without a specified duration and deems them to be month-to-month.[9]

It is the responsibility of the trial judge to fully instruct the jurors on the issues of fact they must determine in order to fulfill their responsibilities; these instructions must not be confusing or misleading. *See* Wright & Miller, *Federal Practice and Procedure* § 2556 (1971). Here, the judge's failure to expressly instruct on the question of duration coupled with his admonition that the jury was to decide "only" whether a sublease was made, and to leave "any further issues" for another time, must have led the jurors to believe the question of duration was not submitted to them. If the issue of dur-

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[9] Petitioner does not ask this Court to rule on the application of state law to the facts in this case. Rather, Petitioner seeks the opportunity to have the question examined by the trial court, a right it has so far been denied.

ation was to be decided by the jury (as opposed to leaving it as a damages issue), it was up to Trinity to ask for an instruction. This it did not do.

Incredibly, the Court of Appeals faulted *Falstaff* for not requesting a jury instruction on the question of duration. App. at 11a-12a. As the Fifth Circuit itself has recognized elsewhere, requested instructions are not necessary to preserve error where the instructions given are erroneous or misleading. *Pryor v. Gulf Oil Corp.*, 704 F.2d 1364, 1376 (5th Cir. 1983); *Turner Constr. Co. v. Houlihan*, 240 F.2d 435 (1st Cir. 1957). Nor is a failure to object a prerequisite to an attack on a misleading jury charge. *Jamison Co., Inc. v. Westvaco Corp.*, 526 F.2d 922, *reh'g denied*, 530 F.2d 34 (5th Cir. 1976).

The wisdom and propriety of these principles are evident: it is the trial court that bears the responsibility for instructing, advising and guiding the jury in its deliberations, and for insuring that all major issues are fully and clearly covered in the charge. The trial court here failed in this responsibility, and then resorted to an extra-judicial instruction to the magistrate.

The Court of Appeals likewise failed to discharge its responsibility to properly review the jury charge. The standard established in the Fifth Circuit requires the reviewing court to "consider the instructions on the whole" and measure them against "the allegations in the complaint, the evidence presented and the arguments of counsel." *Ware v. Reed*, 709 F.2d 345, 348 (5th Cir. 1983), *quoting Coughlin v. Capitol Cement Co.*, 571 F.2d 290, 300 (5th Cir. 1978). Here, the trial court treated the critical issue of duration as a liability issue but failed to give an instruction on it; thus, it totally ignored the evidence and arguments presented by Falstaff that the parties had reached no agreement on lease duration. The Court of Appeals, by approving the deficient charge, failed to follow its own review standard.

This Court should exercise its supervisory authority to correct this error by reversing and remanding for a new trial.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for a Writ of Certiorari.

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APPENDIX

APPENDIX

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APPENDIX

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 83-3623

TRINITY CARTON COMPANY, INC.,
Plaintiff-Appellee,
Cross-Appellant,

v.

FALSTAFF BREWING CORP.,
Defendant-Appellant,
Cross-Appellee.

Aug. 5, 1985

Appeals from the United States District Court
for the Eastern District of Louisiana

Before THORNBERRY, GARWOOD, and HILL, Circuit Judges.

GARWOOD, Circuit Judge:

In this Louisiana diversity case, defendant-appellant Falstaff Brewing Corporation challenges a judgment for damages against it for its breach of a sublease. Falstaff maintains that the district court, which refused to give Falstaff's proposed instruction, improperly instructed the

jury on the issue of consent to confection of the sublease; that the court abused its discretion by refusing to give proposed instructions on conditions precedent, implied conditional offer, and suspensive condition, and by denying post-verdict trial amendments which alleged matters of affirmative defense, including prescription; and that the magistrate's initial recommendation, in the damages phase of the trial, of zero damages was proper as a matter of Louisiana law. Trinity Carton Company, Inc., plaintiff below, cross-appeals, complaining of the district court's failure to award it damages for Falstaff's breach of its obligation to purchase a trash baler under the terms of the contract to sublease.

We hold that neither the district court's refusal of Falstaff's trial amendments and proposed jury instructions, nor its refusal to give verbatim Falstaff's proposed instruction on consent, constituted an abuse of the court's discretion. We agree with the district court that the magistrate's finding of zero damages was improper as a matter of law. On the cross-appeal, we hold that Falstaff is liable to Trinity under their agreement for the purchase of the baler. We therefore affirm the district court's judgment in all respects, except insofar as it contains no award to Trinity for the purchase of the baler; and consequently we remand with instructions to the district court to reform its judgment accordingly.

FACTS

In 1964, Falstaff subleased from Trinity [1] the premises adjacent to Falstaff's New Orleans brewery, upon which

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[1] This sublease (the "1964 sublease") was dated June 5, 1964, and was signed by the parties on July 29, 1964. It was to run for a term of twenty-five years commencing January 1, 1964, and ending December 31, 1988, with options to renew for successive terms of ten and five years. Its term was coincident with the term defined in the base lease between Trinity and the owner-lessor, Broad Street Corporation. The 1964 sublease leased to Falstaff 37,410

it erected and operated a can handling facility. The property of which this subleasehold was a part was leased to Trinity by its owner, Broad Street Corporation.[2] In the latter half of 1969, Falstaff sought to sublease the remainder of the Trinity leasehold, with the intention

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square feet out of the base leasehold. The terms of the 1964 sublease were for a specified "net" rental to be paid to Trinity; and for Falstaff to assume all costs of taxes, insurance, utilities, maintenance, and repair, etc. One clause provided for Trinity's election to cancel the sublease, or to demand accelerated payment in full of the rents for the term of the sublease, upon Falstaff's default. Falstaff was to "maintain property in good condition; to make at its own expense all repairs of any kind . . . it being understood, however, that any structural alterations shall be subject to the approval of the Lessor [Trinity] and Broad Street Corporation."

[2] The property was originally leased to Trinity by Broad Street by instrument dated July 1, 1961, with a five-year term to run until June 30, 1966. Pursuant to Falstaff's request for a longer term in its 1964 sublease, Emmett Meyer, President of Trinity, sought and obtained a new base lease with a considerably longer term, which superseded the 1961 lease.

The new base lease provided, *inter alia*, for a term of twenty-five years, to begin on January 1, 1964 and to end on December 31, 1988, with options to Trinity for renewal for successive periods of ten and five years; and for Trinity's right to sublease in whole or part for legitimate commercial purposes. It gave express approval of the 1964 sublease from Trinity to Falstaff, and a copy of that sublease was annexed to and made a part of the base lease. Broad Street further agreed expressly to "accept and approve any other subleases between Lessee and Falstaff . . . for additional space provided it is not less than the rate basis and terms and conditions as the lease hereto annexed." This clause was inserted at Falstaff's request to Trinity. This new lease also contained a clause entitled "Lessee's Rights for New Construction," obtained by Meyer at Falstaff's request, which read:

> "Lessee shall have the right to demolish any portion of the present improvements, provided Lessee builds, at his expense, any improvements thereon that are comparable or better insofar as the appearance, construction and utilitarian value are concerned. Demolition and erection of improvements are to be approved by Lessor, in writing, prior thereto."

of demolishing the existing improvements and building a can manufacturing plant. In October 1969, Trinity and Falstaff began discussions, but were unable to agree upon a price. Trinity, acting through its New Orleans attorney, Russel Schonekas, desired a net rental [3] at an annual rate of $1.20 per square foot, while Falstaff was willing to offer only in the range $.60 to $.65 per square foot net. Negotiations remained stalemated until an April 13, 1970 telephone conversation in which James S. McClellan, Falstaff's general counsel and a member of its Board of Directors, made what he characterized as Falstaff's final offer, for $.65 per square foot net. Schonekas asked that McClellan put this in writing, and received from McClellan the following letter, dated April 14, 1970:

> "Confirming our telephone conversation yesterday, Falstaff will take a sublease from Trinity Carton Company of all the property heretofore leased from Broad Street Corporation by Trinity Carton Company other than the property heretofore subleased to Falstaff. The rental offered is $.65 per square foot net.
>
> "Falstaff will purchase the bailer [*sic*] for $10,000, or it may be removed if your people so elect.
>
> "I will appreciate it if you will call me after a decision has been made. Because of pending negotiations with regard to the other property,[4] it is necessary that I put a deadline of Monday, April 20,

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[3] The term "net rental" was used to mean that the rental rate quoted would be "net" to sublessor Trinity, that is, free of all costs of repair, maintenance, taxes, insurance, etc., with those items to be borne by the sublessee.

[4] This plainly referred to an unidentified property which McClellan had previously informed Schonekas Falstaff was negotiating to acquire (by lease or otherwise) for the same purpose as the property it was seeking to sublease from Trinity, so that if Falstaff acquired the other property it would not be interested in the Trinity property.

1970, on the proposal herein made. If you can, however, I would greatly appreciate your calling me before that time.

"In the event your people decide to accept this proposal, we would like to move immediately on the consummation of the transaction."

Construing this to be a firm offer of sublease, Schonekas urged and obtained Trinity's approval of sublease at this net rental. Schoenekas sent McClellan an acceptance telegram on April 20, 1970, reading:

"Terms of lease outlined in your letter of April 14th 1970 are acceptable to Trinity. Await review of lease if prepared by you."

After receiving the telegram, McClellan telephoned Schonekas in New Orleans that afternoon. According to Schonekas' testimony, the discussion proceeded as if a sublease agreement had been consummated with all terms other than the amount of the net rent to be identical to those contained in the parties' 1964 sublease. McClellan, however, testified that only the amount of the net rent had been discussed and agreed upon, and that there could be no confection of any sublease obligation until and unless written consent for Falstaff's demolition plan was obtained from Broad Street, and the sublease had been reduced to writing and signed.

Without consulting Schonekas or Trinity, McClellan instructed Falstaff's New Orleans counsel, Lawrence J. Moloney, to seek written consent from Broad Street for Falstaff's proposed demolition. Because the existing building had value as a depreciation tax deduction, Broad Street required a payment from Falstaff of $241,000 before it would give consent. Falstaff refused, and Moloney informed Trinity and Broad Street that the sublease deal was off.

Nonetheless, Trinity felt that a binding sublease had been confected, and Schonekas so advised McClellan in a

letter dated May 8, 1970.[5] McClellan responded by letter dated May 13, 1970, denying that a sublease existed, and asserting: "As you have known from the outset of our negotiations . . . the subleasing of this property by Falstaff was conditioned upon the obtaining of [Broad Street's demolition] approval."[6]

Trinity filed this diversity suit in the district court below in December 1973, alleging breach of a sublease contract, and seeking accelerated rents for the term of the sublease, consequential expenses, including costs of renovation necessary to place other tenants in the premises in mitigation of damages, and the purchase price of the baler. The liability phase of the case was tried to the jury, which returned a general verdict for Trinity. Three months later, Falstaff offered several trial amendments, most in the nature of affirmative defenses; leave to file all but one, for setoff, was denied by the district court.

The district court referred the question of damages to a magistrate, who returned a recommendation of zero damages. The district court refused to accept this recommendation, characterizing it as overturning the jury's verdict on liability. The magistrate's second recommendation assessed damages of $1,011,913.33. The district court

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[5] Demand was also made for the first semi-annual rent installment to be timely paid on June 1, 1970. Schonekas indicated that, should Falstaff fail to tender such payment, Trinity would consider it to be in default, and would, according to the acceleration clause in the (1964) sublease, demand payment of all rents due for the entire term. Schonekas also made reference to Falstaff's obligation to purchase the baler for $10,000.

[6] McClellan reiterated Falstaff's position that prior conversations had concerned primarily, if not exclusively, the question of the amount of net rent, and never addressed other material terms. He also asserted that "[i]t was the contemplation of the parties that the [sublease] would be evidenced by a sublease agreement. No such agreement has been executed and, since Falstaff is unable to make use of the property, there is no purpose in proceeding further."

accepted most of these recommendations with minor adjustments, for a total of $1,055,549.76, together with interest and ten percent attorneys' fees. The court did not, however, assess the purchase price of the baler against Falstaff, though the net damages reflected credits to Falstaff for $6,594.20 in baler rents.

THE ISSUE OF CONSENT

The essential contest on liability was whether a binding oral sublease was in effect between Trinity and Falstaff in May 1970. The jury's verdict was for Trinity, and hence determined that such a sublease was in effect. Falstaff attacks this result by two main objections, although it does not challenge the sufficiency of the evidence or the jury's verdict *per se*. First, Falstaff asserts that the district court abused its discretion when it failed to give Falstaff's proposed instruction on consent, because the court thereafter inadequately instructed the jury on the Louisiana law of confection of obligations. Falstaff also claims that the district court overemphasized the question of whether the agreement was to be confected orally or by a writing, and that such emphasis confused or misled the jury about the consent issue.

Falstaff's second line of attack respecting the consent question is an assertion that the district court abused its discretion by refusing, first, to give Falstaff's proposed jury instructions on implied conditions, conditional offers, conditions precedent and suspensive conditions, and, second, by denying Falstaff leave to file its proposed post-verdict amendments to its pleadings. Our disposition of these second points is procedural, and is discussed below separately.

A. The District Court's Instructions to the Jury. We turn first to adequacy of the district court's instruction to the jury on the issue of consent. The Louisiana law of obligations provides that no contract is properly confected without the consent of both parties to all essential

terms of the contract. LSA-C.C. art. 1766; *see also N-Y Associates, Inc v. St. Charles Parish Policy Jury*, 422 So.2d 520 (La.App.1982); *Woodward v. Barringer*, 24 So.2d 200 (La.App.1945). Neither party disputes that there was agreement as to price. Falstaff's position was that no other material terms of the sublease, including duration, were ever discussed or agreed upon, and that no obligation could be confected until, in accordance with the intent of the parties, the sublease was reduced to writing and signed. Trinity's position was that it was understood, and at one point expressly discussed, that the other terms, including duration, would track those terms agreed upon and embodied in the parties' 1964 sublease; and that the course of the negotiations, considered in the context of prior oral contracts between the parties,[7]

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[7] The record shows that the parties had, on at least four prior occasions, confected oral agreements and acted in reliance upon them before they were reduced to writing and signed, even where they had an intention to reduce them to writing; and, on two of these occasions, despite an ultimate failure to execute any written instrument.

In the case of their 1964 sublease, the parties reached verbal agreement before December 20, 1963, prior to reduction of their agreement to writing. Then, at Falstaff's request, Emmett Meyer, President of Trinity, sought and obtained Broad Street's approval of Falstaff's demolition plans. Even so, Falstaff commenced its demolition and construction of a can manufacturing facility on or about January 1, 1964, the effective date of the sublease, *see* note 1, *supra*, in reliance only on a letter of approval of the proposed plans by the lessor, Broad Street. The sublease was not signed until July 1964.

In September 1967, pursuant to a verbal request by Falstaff, Meyer located and leased two warehouse storage bays in his name but on behalf of Falstaff. Without a written agreement (and despite the intent of the parties that this contract would eventually be reduced to writing), Falstaff timely performed its payment obligations and never raised the issue of lack of a written agreement. Similarly, in December 1967, again on verbal request and without the benefit of a written instrument, Meyer stored in his

clearly showed that, although the parties contemplated reduction of the agreement to writing, such writing was only meant to commemorate their oral agreement. There was evidence to support both Falstaff's and Trinity's positions.

The district court's instructions to the jury formulated the consent issue in two ways. First, the jury was told it must determine whether the parties mutually intended to be bound by the sublease contract before, or not until, a formal written sublease was signed. The district court properly instructed the jury that, under Louisiana law, a valid oral contract could be confected where it was not the intention of the parties that an obligation obtain only upon execution of a writing. *See, e.g., Mermelstein v. Schwab*, 64 So.2d 37, 38 (La.App.1953). The question of whether the parties contemplated that a written sublease would merely commemorate the terms of their oral agreement, or whether such writing was a material prerequisite to the formation of the contract, was placed squarely before the jury.

Second, the district instructed the jury that Louisiana law requires three things as absolutely necessary to the confection of an obligation: the thing, the price and consent. LSA-C.C. arts. 1766, 2670. It discussed contract formation by offer and acceptance. *See, e.g.*, LSA-C.C. arts. 1798, 1800, 1803. The court's instructions defined

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premises some of Falstaff's excess "jacket-paks." Meyer billed and was paid by Falstaff.

In August 1968, Meyer and a Falstaff official in St. Louis confected an oral agreement between Falstaff and Ringle & Meyer Corporation, which fabricated fiber cartons for Falstaff. The agreement, which replaced a prior contract, was to be effective on September 1 and was to be reduced to writing. This contract involved a die-cutting service by Ringle & Meyer for Falstaff on some 2,700,000 fiber cartons at a price of $81.00 per thousand, for a total cost of $218,700. It was commemorated, however, only by a letter from Falstaff's Warren Mathews to Meyer, dated September 12.

consent in the statutory language, *see* LSA-C.C. art. 1819, and clearly informed the jury that consent was in dispute between the parties, expressly indicating both Falstaff's contention that no consent had been given, and Trinity's contention that it had. The jury was instructed to focus on the intent of the parties in determining whether consent had in fact been given, including consideration of whether all the details and conditions material to the contract were agreed upon and understood by the parties, *see* LSA-C.C. arts. 1797, 1819, and the instructions informed the jury of the necessity of determining the intention of the parties with respect to the importance of a written sublease. The jury was instructed that it could consider prior dealings and contracts made previously between the parties,[8] the size and value of the proposed sublease at issue, and whether Falstaff considered or believed that the contract of sublease would not be confected unless and until written consent of Broad Street for demolition had been obtained.

After careful review of the district court's instructions to the jury, we conclude that the court made no substantive error of Louisiana law; neither were its instructions

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[8] The Louisiana Code indicates that

> "[t]he proposition as well as the assent to a contract may be express or implied:
>
> "Express, when evinced by words, either written or spoken;
>
> "Implied, when it is manifested by actions, even by silence or by inaction, in cases in which they can from circumstances be supposed to mean, or by legal presumption are directed to be considered as evidence of an assent." LSA-C.C. art. 1811.

The language of LSA-C.C. art. 1816 is similar: "Actions without words, either written or spoken, are presumptive evidence of a contract, when they are done under circumstances that naturally imply a consent to such contract . . . ." *Cf.* LSA-C.C. arts. 1813-15. Analogy may be made to the common law contract implied in fact, resting upon consent implied from facts and circumstances that reflect a mutual intention to contract. *See also V-8 Taxicab Service, Inc. v. Hayes*, 322 So.2d 442 (La.App. 1975).

unclear or otherwise faulty or insufficient on the question of consent. It is clear that the district court's instructions placed before the jury the relevant substantive issues relating to the question of consent, and that the court fairly and clearly informed the jury of the requirements of Louisiana law. Falstaff's proposed instruction said nothing material that was not adequately covered by the instructions given. In these circumstances, the district court's decision not to give verbatim Falstaff's requested instruction on consent was not an abuse of its discretion.[9] *Delancey v. Motichek Towing Service, Inc.*, 427 F.2d 897, 902 (5th Cir.1970).

B. The Question of Term. Falstaff asserts that the jury charge and verdict establish only that consent to the contract was given; that the term of duration of the sublease was never litigated; and that there is no express finding of term by the district court. Falstaff thus claims that the jury's general verdict is insufficient to allow the court to fix damages.

The district court's instructions to the jury clearly indicate that a determination that the parties intended the nonprice material terms of the sublease contract to be identical to those embodied in their prior 1964 sublease was essential to a finding that there was consent to the sublease.[10] Falstaff made no objection to the charge on the ground that it did not adequately cover this matter;

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[9] In this context, we note that Falstaff's counsel pointedly announced immediately after the instructions had been given and before the jury began its deliberations that he had no objection to the charge as given, although he did protest the court's refusal to give his requested instructions.

[10] The court told the jury, "Trinity contends that . . . it was agreed and understood that the additional terms would be the same as those in the 1964 sublease." And later, the jury was told, "You are to decide if all the terms, that is, the details and conditions, were agreed upon and understood by the parties so that there was a complete contract . . . ."

nor did it tender any requested charge thereon. The record of trial indicates that this question was indeed litigated conspicuously as an essential component of the claimed consent. Plainly, both parties, the court and the jury all understood that if there was not an agreement on the basis of all the terms, other than the net rental rate, of the 1964 sublease, then there was no agreement. Thus, the jury's verdict determined that Falstaff consented to all material terms of the contract, including nonprice terms identical to those contained in the 1964 sublease. Falstaff's complaint that no term of sublease was determined is rejected. *See Bank of America National Trust & Savings Association v. Hayden*, 231 F.2d 595, 602 (9th Cir.1956). *Cf.* Fed.R.Civ.P. 49(a) (implied trial court findings in support of judgment where issues omitted from special verdict or interrogatories without objection).

THE REQUESTED JURY INSTRUCTIONS

Falstaff asserts that there is evidence that the existence of an implied condition precedent was impressed upon the sublease negotiations. It maintains that, because Trinity knew precisely of its plan to demolish existing buildings and erect a can manufacturing plant and that Broad Street's permission would be necessary thereto, consent to the sublease could be found to have been conditioned upon obtaining that permission. It asserts that such a condition could be found to be implied by the very structure of the negotiations, "from the nature of the contract, or from the presumed intent of the parties." LSA-C.C. art. 2026. Thus, Falstaff sought jury instructions on conditions precedent, conditional offers, including implied conditions, and suspensive conditions,[11] and urges

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[11] LSA-C.C. art. 2021 states:

> "Conditional obligations are such as are made to depend on an uncertain event. If the obligation is not to take effect until the event happened, it is a suspensive condition; if the obliga-

that it was an abuse of the district court's discretion to refuse to give such instructions.

A denial that a condition precedent occurred must be specifically and particularly pleaded, Fed.R.Civ.P. 9(c); *see also Sam's Style Shop v. Cosmos Broadcasting Corp.*, 694 F.2d 998, 1004 (5th Cir.1983); *EEOC v. Klingler Electric Corp.*, 636 F.2d 104 (5th Cir.1981), and such matters may not be raised by a general denial.[12] Falstaff did not plead these matters in its answer or any amendment thereto. Nor was this issue tried by consent, *see* Fed.R.Civ.P. 15(b); *American Standard Credit, Inc. v. National Cement Co.*, 643 F.2d 248, 257 n. 4 (5th Cir. 1981), for that requires that the parties actually recognize the issue to have been litigated.

Falstaff asserts that "[t]he Trial Judge knew or should have known from the Pre-Trial Order, that the sub-lease was subject to a condition, *i.e.*, prior written consent to demolition by the landowner as required in the base lease between Broad Street and Trinity." But, after a careful reading of the pretrial order, we conclude that the issue of condition precedent (or suspensive condition) was contemplated only in the context of whether Falstaff had given its consent to the confection of the sublease.[13] Cer-

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tion takes effect immediately, but is liable to be defeated when the event hapens, it is then a resolutory condition."

[12] LSA-C.C.P. art. 857 imposes a similar requirement. A party relying on suspensive condition to an obligation as a defense bears the burden of proving the existence of the parties' agreement on the condition and the failure of its occurrence. *Sam's Style Shop*, 694 F.2d at 1004; *see also F.C. Williams Real Estate v. Haydel*, 364 So.2d 171, 172 (La.App. 1978); *Dales Jewelers, Inc. v. Rice*, 316 So.2d 416, 417 (La.App. 1975). In this diversity suit, we apply the Louisiana law respecting the burden of proof (though pleading is a matter of federal law). *See, e.g., Cities Service Oil Co. v. Dunlap*, 308 U.S. 208, 60 S.Ct. 201, 84 L.Ed. 196 (1939).

[13] The pretrial order controls the course of the trial, Fed.R.Civ.P. 16; *Hodges v. United States*, 597 F.2d 1014, 1017-18 (5th Cir. 1979),

tainly the language of McClellan's April 14 letter to Schonekas makes no express reservation of Falstaff's consent to the formation of the sublease, upon either the reduction to writing of the agreement, or of obtaining prior permission from Broad Street to demolish. The language of that letter is couched in terms that constitute a firm offer; Trinity interpreted the letter in that way, and timely accepted.

The record reveals that the question of condition was litigated within the framework of the issue of consent. Trial by consent may not be deemed where evidence concerning the issue that is maintained to have been thusly tried is also relevant to other issues that in fact have been pleaded and tried, at least in the absence of clear notice that such issue was being raised. *United States v.*

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and a court need not consider matters not contained therein except to prevent manifest injustice. Amendments or objections thereto are required or else a litigant is barred from raising the matter on appeal. *Labbee v. Roadway Express, Inc.*, 469 F.2d 169, 172 (8th Cir. 1972); *Hodgson v. Humphries*, 454 F.2d 1279, 1281 (10th Cir. 1972); *Fernandez v. United Fruit Co.*, 200 F.2d 414 (2d Cir. 1952), *cert. denied*, 345 U.S. 935, 73 S.Ct. 797, 97 L.Ed. 1363 (1953). An attempt to pursue an issue not contained in the pretrial order may be rejected by a trial court, and the court may properly refuse to give an instruction on that issue. *Flannery v. Carroll*, 676 F.2d 126, 129, 130 (5th Cir. 1982); *Allen v. U.S. Steel Corp.*, 665 F.2d 689 (5th Cir. 1982). Such refusal is within the trial court's discretion, *Flannery*, 676 F.2d at 130; *Bettes v. Stonewall Ins. Co.*, 480 F.2d 92 (5th Cir. 1973); *Pacific Indemnity Co. v. Broward Co.*, 465 F.2d 99 (5th Cir. 1972). Even though amendment of the pretrial order may be allowed where no surprise or prejudice to the opposing party results, where, as here, the evidence and the issue were known at the time of the original pretrial conference, amendments may generally be properly refused. Each party has an affirmative duty to allege at the pretrial conference all factual and legal bases upon which the party wishes to litigate the case. *See* 6 Wright & Miller, *Federal Practice and Procedure* § 1527. Failure to do so may implicate waiver of the issue at the discretion of the trial court, subject to considerations of fairness and efficient administration of the trial.

State of Texas, 680 F.2d 356, 361 (5th Cir.1982); *International Harvester Credit Corp. v. East Coast Truck*, 547 F.2d 888, 890 (5th Cir.1977). Where prejudice would result to deem the issue to have been tried by consent, and especially where there would be no opportunity for the opposing party to adequately prepare to meet the unpleaded issue, courts will refuse to deem the pleadings amended. *Combee v. Shell Oil Co.*, 615 F.2d 698 (5th Cir.1980). Falstaff did not plead nonoccurrence of such a condition, and it litigated this question as one of fact embedded in the consent issue. The district court did not abuse its discretion by refusing to give these requested instructions.

THE POST-VERDICT TRIAL AMENDMENTS

Falstaff also complains that it was an abuse of the district court's discretion to deny its post-verdict proposed pleading amendments. Falstaff, several months after return of the jury's verdict, requested variously to amend its orginal answer to include: the defense of condition precedent, LSA-C.C. 2043 (*see also* LSA-C.C. arts. 2021, 2028); failure to agree on all essential elements of the obligation, *see* LSA-C.C. art. 1819; absence of cause (failure of consideration), LSA-C.C. arts. 1893, 1896-97; allegation that, under LSA-C.C. art. 2685, the absence of an express determination of the term of the lease implied a month-to-month lease only, which Falstaff by its letter dated May 13, 1970, gave sufficient notice to terminate, *see* LSA-C.C. art. 2686; the defense of prescription,[14] LSA-C.C. art. 3538; and an allegation of setoff

[14] Prescription is a peremptory plea under Louisiana law. LSA-C.C.P. art. 927. It "may be pleaded at any stage of the proceeding in the trial court *prior to a submission of the case for a decision* . . . ." LSA-C.C.P. art. 928 (emphasis added). If later pleaded, it *may* be remanded to the trial court for a trial of the exception, LSA-C.C.P. art. 2163, but need not be considered by the appellate court. *Cf. Succession of Douglass*, 225 La. 65, 72 So.2d 262, 264 (1954). Falstaff's assertion that it could by right plead this defense

for the rents of sublessees in occupancy of the premises. The district court denied leave to file all but the last of these, none of which were proposed until over three months after the jury's verdict on the issue of consent and liability had been entered.

The Federal Rules of Civil Procedure require that such defenses "shall be set forth affirmatively." Fed.R.Civ.P. 8(c).[15] A general denial does not serve to raise such defenses. *Jackson v. Seaboard Coastline R.R. Co.*, 678 F.2d 992, 1010-11 (11th Cir.1982). Failure to plead such defenses may implicate a waiver and the subsequent exclusion of those defenses from the case. *Combee*, 615 F.2d at 700; *Henry v. First National Bank of Clarksdale*, 595 F.2d 291, 298 n. 1 (5th Cir.1979), *cert. denied*, 444 U.S. 1074, 100 S.Ct. 1020, 62 L.Ed.2d 756 (1980).

Of course, the requirement that affirmative defenses be pleaded or waived must be applied in the context of the Federal Rules' liberal pleading and amendment policy, the

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at any time, including following the jury's verdict on liability, overstates Louisiana law, *see Merchants Adjustment Bureau v. Malta*, 102 So.2d 781, 783-84 (La.App. 1958), at least in the context of constructing an analogy appropriate to federal procedure, which does not employ the Louisiana scheme of pleaded exceptions. The issue of liability, upon which a plea of prescription is peremptory if accepted, was submitted to the jury "for decision"—binding in the federal courts if supported by substantial evidence and if no mistake of law has occurred—prior to Falstaff's proffer of its trial amendments. Under Fed.R.Civ.P. 8(c), prescription is a defense which must be affirmatively pleaded; thus, contrary to Falstaff's urging, Louisiana law on this point is neither conclusive nor persuasive in this diversity case, where Falstaff did not timely plead this affirmative defense. *See Combee*, 615 F.2d at 700.

[15] We note that Fed.R.Civ.P. 8(e)(2) allows the pleading of affirmative defenses in the alternative with a general denial. We note also that LSA-C.C.P. art. 1005 requires that a defendant's answer set forth affirmatively any matter constituting an affirmative defense. Article 1006 allows pleading of alternative defenses, even where they are factually or legally inconsistent or mutually exclusive.

goal of which is to do substantial justice. Falstaff had under Fed.R.Civ.P. 15(a) an automatic amendment period of twenty days following the filing of its original answer, during which time it could have amended its pleadings as of right. After the expiration of this period, or after the filing of a responsive pleading, leave to amend was within the district court's discretion. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 329-31, 91 S.Ct. 795, 801-02, 28 L.Ed.2d 77 (1971); *Hall v. Aetna Cas. & Sur. Co.*, 617 F.2d 1108, 1110 (5th Cir. 1980). Refusal of leave to amend is reviewable on an abuse of discretion standard. *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230 (1962); *Wedgeworth v. Fibreboard Corp.*, 706 F.2d 541, 546 (5th Cir.1983). Discretionary denial of leave to amend must be based on a "substantial reason," *Wedgeworth*, 706 F.2d at 546; *Dussouy v. Gulf Coast Investment Corp.*, 660 F.2d 594, 598 (5th Cir.1981), including undue delay,[16] bad faith or dilatory motive, or undue prejudice to the opposing party. *Foman*, 371 U.S. at 182, 83 S.Ct. at 230; *Dussouy*, 660 F.2d at 597-98 (5th Cir.1981). Post-verdict or -judgment amendments are occasionally allowed, but where they may substantially prejudice the other party or are merely the result of a long and unreasonable delay, particularly if the movant was aware of the facts upon which the amendment is predicated and could have raised the matter before judgment, such amendments properly may be denied. *Union Planters National Leasing, Inc. v. Woods*,

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[16] The proposed amendment must be timely: it must not have been delayed solely for the purpose of gaining a tactical advantage. *Chitimacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157, 1163-64 (5th Cir. 1982). Undue delay alone may be sufficient to foreclose amendment. *Dussouy*, 660 F.2d at 598-99. *See also, Chitimacha Tribe*, 690 F.2d at 1163; *Morgan Guaranty Trust Company of New York v. Blum*, 649 F.2d 342, 345 & n. 4 (5th Cir. 1981); *Gregory v. Mitchell*, 634 F.2d 199, 203 (5th Cir. 1981); *Dave v. Payless Cashways, Inc.*, 612 F.2d 1022, 1025 (5th Cir. 1981).

687 F.2d 117, 121 (5th Cir.1982); *see also Combee*, 615 F.2d at 700.

Falstaff did not previously plead or otherwise raise, as by motion or in the pretrial order, any of the matters contained in its post-verdict proffered pleading amendments. It necessarily was put on notice by the very nature of the suit that these matters of affirmative defense would be relevant to, if not potentially controlling of, the determination of liability. Falstaff makes no claim, and the record does not suggest, that it was unaware of any facts which form the bases of these defenses; nor does Falstaff offer any excuse beyond an assertion made at oral argument, which, when unveiled, is only that it did not expect to lose. It chose to postpone assertion of these grounds of defense over three years after the suit was filed, and nearly three and one-half months after the jury's verdict assessing liability had been entered. There is simply no justification for such delay. This Circuit has expressly disallowed the use of seriatim theories of defense. *Union Planters*, 687 F.2d at 121; *Freeman v. Continental Gin Co.*, 381 F.2d 459, 469-70 (5th Cir. 1967); *see also Ford Motor Co. v. Auto Supply Co., Inc.*, 661 F.2d 1171, 1172 (8th Cir.1981) (post-summary judgment motion to amend answer denied when it was "transparent attempt to manufacture a defense after [defendant's] liability had already been established"). Under these circumstances, it worked no miscarriage of justice, nor was it an abuse of the district court's discretion, to deny Falstaff's belatedly proposed pleading amendments.

THE QUESTION OF DAMAGES

Falstaff asserts that the magistrate's initial finding of a zero quantum of damages was proper as a matter of Louisiana law. The district court correctly refused to accept these findings. Falstaff's assertion that it was denied possession of the premises, and that Trinity hence breached the sublease and discharged Falstaff, is not a

question properly to be considered in a determination of the quantum of damages. It is instead, as the district court correctly described it, quite clearly a matter of affirmative defense on the merits, addressing the issue of liability. Falstaff never pleaded such defense (and it was not even included in the proffered post-verdict amendments) as it was required to do, Fed.R.Civ.P. 8(c); *Tomlin v. Ceres Corp.*, 507 F.2d 642, 647 (5th Cir.1975), and it was not raised in the pretrial order. Liability on the merits was the matter tried to the jury, and its verdict was against Falstaff. Thus, any defense on the merits was concluded adversely to Falstaff. *See Bank of America National Trust & Savings Association v. Hayden*, 231 F.2d 595, 602 (9th Cir.1956). All that was referred to the magistrate was the quantum of damages. The magistrate therefore acted outside his authority, and went beyond the scope of his instructions from the district court, in making the finding of zero damages based on the theory that Falstaff was denied possession.[17]

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[17] The magistrate applied the following reasoning: Trinity, ostensibly to mitigate damages occasioned by Falstaff's breach, sublet the premises to alternative tenants. This act, and the performance of renovations necessary to obtain the tenants, which altered the premises contrary to Falstaff's announced needs, under Louisiana law effected a dispossession of Falstaff from the premises. The magistrate concluded that, as of the first day of the sublease, Trinity had breached the sublease and that Falstaff therefore owed Trinity no damages.

The magistrate may have reached this conclusion upon a misapprehension of the evidence. He apparently based his conclusion that Trinity had sublet the premises to a replacement tenant effective the first day of the sublease's term by virtue of Trinity's accounting sheet entry crediting rents from "Letellier-Phillips" for a period that began with the first month of the term of the sublease. These rents were in fact obtained, not for sublease occupancy of the premises, but for the use of Trinity's trash baling machine. Trinity apparently presented those rents as credits to Falstaff in its pleadings and evidence because it assumed that a finding that Falstaff was liable upon the sublease obligation would include Falstaff's obligation to purchase the baler as agreed, and

The district court, after refusing to accept the magistrate's initial ruling, again referred the question of damages to the magistrate, who then determined that Falstaff owed Trinity damages in the amount of $1,011,913.33, including accelerated rents for the entire term of the sublease,[18] maintenance and repair to the existing buildings, and costs of insurance, taxes, and the like, as required by the sublease, and giving Falstaff credit for rents received from substitute tenants (including rents from use of the baler). This recommendation did not include liability for the purchase price of the trash baler, nor costs of renovation necessary to Trinity's mitigation efforts or financing costs therefrom, these latter exclusions again having been made by the magistrate on the basis that Trinity acted against Falstaff's expressed need

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that, having done so, such rents would properly need to be credited to Falstaff. In fact, Trinity did not place alternative tenants in possession as sublessees until seven months following the starting date of the sublease. Thus, even should the magistrate's factual conclusion give rise under Louisiana law to a valid defense to liability on the merits for Falstaff, a point upon which we do not express an opinion, nevertheless the magistrate's determination that Trinity prevented Falstaff from taking possession is clearly erroneous.

[18] We note that anticipatory repudiation is actionable under Louisiana law. *Marek v. McHardy*, 234 La. 841, 101 So.2d 689 (1958). A lessor may, where appropriate, act to mitigate damages. *Overmeyer Co. v. Blakeley Floor Covering, Inc.*, 266 So.2d 925 (La.App. 1972). We note also that assessing rents for the entire duration of a lease as yet unexpired may be so severe as to be punitive. *See Chapman v. Capri Construction Co.*, 248 So.2d 101 (La.App. 1971). But Falstaff has never (at trial or on this appeal) objected to the damages assessed on any such ground (and we express no opinion in this regard), and Trinity conceded at oral argument that, having in essence paid the rents in full for the entire term of the sublease in advance, Falstaff will (at least on payment) be entitled to possession of the sublease premises for the entire remaining term of the sublease, subject only to any existing unexpired subleases obtained by Trinity in its mitigation efforts. Falstaff will also, of course, be entitled to receive the rents therefrom.

to demolish by performing such renovation. The district court accepted most of these findings, but allowed costs of renovation and financing charges therefor, thereby increasing the net damages to $1,055,549.76, plus attorneys' fees of ten percent on the whole of the award, interest included, with interest calculated from the date each item became due. Apart from Falstaff's claim, which we have rejected, that the magistrate's initial determination of zero damages was correct, neither party has objected on appeal to any of these finding of damage, except for Trinity's cross-appeal concerning the purchase of the trash baler. Consequently, on all points of damage contained in the district court's judgment, with the sole exception of the matter of the trash baler, addressed below, we affirm that court's judgment.

THE TRASH BALER

There is, on this record, no doubt that Falstaff agreed to purchase the trash baler for $10,000, as evidenced by its letter of April 14, 1970 from McClellan to Schonekas. Nor does Falstaff dispute that it so agreed. Testimony of Falstaff's witnesses indicates, to the contrary, that it intended to honor its offer to purchase the baler, subject only to the confection of a sublease agreement with Trinity. The jury's verdict establishes the existence of that sublease agreement, and, consequently, as a matter of law, the existence of Falstaff's obligation to purchase the baler.[19]

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[19] The matter was pleaded in Trinity's initial complaint. The district court apparently determined that Trinity had waived the issue of liability for the purchase of the trash baler because it did not object to absence of instructions to the jury on this issue. But this was not a factually disputed matter. There was no need to submit it to the jury.

The record indicates that Trinity brought the baler issue to the attention of the court at every reasonable juncture, with sufficient detail to inform that court of the fact of and the basis for Trinity's position: Trinity raised the issue in its motion's to oppose the

Because there are no issues of contested fact with respect to this purchase obligation, the price having been established by Falstaff's offer letter, we remand with instructions to the district court to reform its judgment to include in favor of Trinity additional damages of $10,000, plus interest at the legal rate from the date of the beginning of the term of the sublease.[20] Falstaff may, of course, keep the baler.

CONCLUSION

In accordance with the foregoing, we affirm the district court's judgment in all respects save the quantum of damages. On this single point, we remand with instructions to the district court to reform its judgment to include the purchase price of the baler and interest thereon

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magistrate's initial (zero) damages determination, and also pointed out the fact that the Letellier-Phillips "rents" credited to Falstaff were for use of the baler, and not for sublease of the subject premises. It raised this issue again in its objections to the magistrate's second damages determination. And although it did not raise the matter by a motion to reform the judgment or by its own motion for new trial following entry of judgment, Trinity did raise these points again in detail in its memorandum in opposition to Falstaff's motion for new trial. Finally, Trinity raised this point before this Court by cross-appeal.

The district court was adequately apprised of the nature of Trinity's assertions regarding the baler in a manner calculated to make the district court aware of the contention and the undisputed factual and legal basis therefor, and affording the court an opportunity to recognize and to correct any error.

[20] Falstaff has already received credits in the amount of $6,594.20 for rents received from the use of the trash baler by "Letellier-Phillips." Any rents attributable to the baler and received by Trinity since the time this appeal was taken must, of course, be credited to Falstaff; likewise, any costs associated with maintaining the baler for Falstaff's ultimate benefit that have been incurred by Trinity since that time must be restored to Trinity. We note in passing that it was Falstaff's own trash upon which the baler was used.

at the legal rate in the damages owed to Trinity by Falstaff.

The judgment of the district court is affirmed in all respects except as to the damages for the baler, as to which it is reversed and remanded. Accordingly, the cause is REMANDED to the district court with directions to reform its judgment in accordance herewith.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-3623

TRINITY CARTON COMPANY, INC.,
Plaintiff-Appellee,
Cross-Appellant,

versus

FALSTAFF BREWING CORPORATION,
Defendant-Appellant,
Cross-Appellee.

Appeals from the United States District Court for the
Eastern District of Louisiana

[Filed Sept. 30, 1985]

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion August 5 ——, 5 Cir., 1985 ——F.2d——)
(September 30, 1985)

Before THORNBERRY, GARWOOD and HILL, Circuit Judges.
PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible] Garwood
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 73-3399

SECTION "E"

TRINITY CARTON COMPANY, INC.

versus

FALSTAFF BREWING CORPORATION

JUDGE'S INSTRUCTIONS TO THE JURY (CHARGE) on Wednesday, November 10, 1976; THE HONORABLE FRED J. CASSIBRY, District Judge, presiding.

APPEARANCES

For Plaintiff:

JAMES J. MORRISON, JR., Esq.
International Trade Mart Building
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For Defendant:

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New Orleans, Louisiana 70112.

REPORTED BY: Joseph H. Echezabal, CSR/RPR
Official Court Reporter.

[2] PROCEEDINGS

(JUDGE'S CHARGE) (Wednesday, November 10, 1976)

THE COURT: Ladies and gentlemen of the jury:

Now that you have heard the evidence and the argument, the time has come to instruct you as to the law governing the case.

Although you, as jurors, are the sole judges of the facts, you are dutybound to follow the law as stated in the instructions of the Court and to apply the law so given to the facts as you find them from the evidence before you. You are not to single out one instruction alone as stating the law, but you must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the complaint of the plaintiff and the answers thereto of the defendant. You are to perform this duty without bias or prejudice as to any party. The law does not permit jurors to be governed by [3] sympathy, prejudice or public opinion. The parties and the public expect that you will carefully and impartially consider all the evidence, follow the law as stated by the Court and reach a just verdict, regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth and holding the same or similar stations in life. The law is no respecter of persons. All persons, including corporations, stand equal before the law, and are to be dealt with as equals in a court of justice.

The burden is on the plaintiff in a civil action, such as this, to prove every essential element of its case by a preponderance of the evidence. To establish by a preponderance of the evidence means to prove that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds belief that what is sought to be proved is more likely true than not true.

Statements and argument of counsel are not evidence in the case. The testimony of attorneys given from the witness stand in this case is, of course, [4] evidence.

If you have obtained the impression at any time during this trial that I had any opinion respecting what may or may not be a fact in this case, or if you have heard any expression from me in connection with ruling on questions of evidence or in any other manner, you will remember that my conclusion is in no sense to weigh with you or to control you in your finding and final determination of what the facts are, because that is your sole duty.

Generally speaking, there are two types of evidence. One type is direct evidence, such as the testimony of an eyewitness. The other type is indirect or circumstantial evidence; that is, the proof of a chain of circumstances pointing to the existence or non-existence of certain facts. As a general rule, the law makes no distinction whatever between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all the evidence, both direct and circumstantial.

You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw [5] from facts which you find have been proved such reasonable inferences as seem justified in the light of your own experience.

An inference is a deduction or conclusion which reason and common sense lead the jury to draw from the facts which you find from the evidence have been proven.

While the burden rests upon the party who asserts the affirmative of an issue to prove his claim by a preponderance of the evidence, this rule does not require demonstration or such degree of proof as produces absolute certainty, since in human affairs absolute certainty is seldom possible. In a civil action, such as this, it is proper to find that a party has succeeded in carrying the burden of proof on an issue of fact if, after consideration of all the evidence in the case, the jurors believe that what is sought to be proved on that issue is more likely true than not true.

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You should carefully remember the testimony given, the circumstances under which each witness has testified and every matter in evidence which tends to indicate whether the witness is worthy [6] of belief. Consider each witness' intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider also any relation each witness may bear to either side of the case, the manner in which each witness might be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an accident or incident or transaction may see or hear it differently and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or wilful falsehood.

A witness, including a plaintiff or a defendant, may be discredited or impeached by contradictory evidence, or

by evidence that at other times the witness has made statements which are inconsistent with the witness' present testimony.

If you believe that any witness has been impeached and thus discredited, it is your exclusive [7] province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust the witness' testimony in other particulars, and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

The plaintiff, Trinity Carton Company, Inc., claims that the defendant, Falstaff Brewing Corporation, is liable to it for damages allegedly sustained by it as a result of the failure of Falstaff to comply with the provisions of a sublease entered into between them, affecting property in Square 586 of the City of New Orleans, and an agreement by Falstaff to purchase a baler from Trinity.

The defendant, Falstaff, denies any liability to the plaintiff, Trinity, and denies that it has any binding sublease or agreement with Trinity, because only preliminary and incomplete negotiations were entered into, there being no agreement as to the terms of the lease, and there was no intention of the parties to be bound until a written lease agreement was signed, because written permission of the landlord for demolition had not been obtained. The plaintiff, [8] Trinity, contends that a complete, binding agreement of sublease was entered into between the parties, one that was in no way dependent upon reduction of the agreement to a formal written sublease, and contends further that the purpose of a written sublease was merely to provide a definite proof of the agreement.

You are to decide, under the facts and circumstances in evidence in this case, what the parties' intentions were as to the role of a formal written sublease:

1. Was it their intention not to be bound until the formal written lease was signed; or

2. Was the formal written lease merely to serve as proof of a previous binding agreement.

Under the law of Louisiana, a lease or a sublease may be made either by written or verbal contract, and it may be partly oral and partly written.

Article 2670 of the Louisiana Civil Code provides that three things are absolutely necessary to the contract of lease: the thing, the price, and the consent.

Consent is the concurrence of intention in the parties to a lease with regard to the terms and conditions of the lease, reciprocally communicated, either orally or in writing, or both.

[9] Consent is the thing which is in dispute here.

Falstaff contends that there was no consent, because there were many terms and provisions necessary to a sublease of this value which were not discussed by the parties or agreed upon.

Trinity contends that consent was given, because the price and the thing, the premises to be subject to the lease, were agreed upon, and it was agreed and understood that the additional terms would be the same as those in the 1964 sublease.

Falstaff contends also that there was a lack of consent, because there was no intention for the negotiations to be binding until the written sublease was signed by the parties.

I will discuss with you now the rules in the law of Louisiana relating to the determination of whether consent has been given where the parties contemplate that an oral argeement of lease, or partly oral, partly written, will be reduced to writing, and that a formal lease agreement will be signed.

Where the parties contemplate in their negotiations that a part of the bargain is that the contract shall be

reduced to writing in a formal written lease to perfect it, the final consent is [10] suspended, the contract is incomplete, and cannot be enforced until the written lease is signed by all parties. This is true even though all the terms may have been agreed upon.

Where the parties negotiate a complete contract without contemplation as a part of the bargain that the contract shall be reduced to writing in a formal written lease to perfect it but contemplate merely that the contract shall be reduced to writing in a formal written lease as formal proof of their agreement, the contract is enforcible, even though the formal lease is never prepared and signed.

Where the parties negotiate a complete contract and specifically bind themselves to sign a formal written lease in the future, the contract is enforcible even though the formal lease is never signed.

The law recognizes that a complete contract results when one of the parties makes an offer or proposal embodying all the terms to be agreed upon by the parties, and the other accepts it.

You are to decide if all the terms, that is, the details and conditions, were agreed upon and understood by the parties so that there was a complete contract, and you are to decide further what their [11] intention was as to the importance of a written lease:

1. Was it contemplated by the parties that consent would be withheld until the written lease was signed; or

2. Was consent given and the written lease merely to serve as formal proof of the agreement.

In your deliberations, you should consider all the facts and circumstances shown by the evidence as to the importance attached to a written lease in their negotia-

tions in determining the intent of the parties, and you may consider also the following:

1. The prior dealings and contracts between these parties;

2. The size and value of the proposed lease;

3. Whether the defendant considered or believed that the contract of sublease could not be perfected unless and until the written consent of the property owner, Broad Street Corporation, was obtained to demolish existing buildings on the property to be subject to the lease.

4. Any propensity of the parties to litigate.

It is your function to decide what weight, if any, is to be given to any of these matters I have just outlined. [12] You will decide now only whether the defendant, Falstaff, is liable to the plaintiff, Trinity; that is, whether they entered into a binding agreement of sublease. Any further issues in this case will be tried separately at another time.

Upon retiring to the jury room, you will select one of your number to act as foreman. He will preside over your deliberations as be your spokesman in Court.

Your verdict must represent the considered judgment of each juror. In other words, to reach a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

We are going to submit to you two verdict forms which I will go over with you in a moment. You must agree unanimously on the verdict form that you decide to return.

It is your duty as jurors to consult with one another and to deliberate with one another with a view to reaching an agreement if you can do so without doing violence to individual judgment. Each of you must decide this case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors.

In the course of your deliberations, do not [13] hesitate to reexamine your own views and change your opinion if convinced it is erroneous, but do not surrender your honest conviction as to the weight or effect of the evidence strictly because of the opinion of your fellow jurors or in order to reach a verdict.

Now I will give you two verdict forms. You will return one of these depending on whether you decide the case for the plaintiff or for the defendant.

We, the jury, find in favor of either plaintiff or defendant. You must decide the case, and the foreman will sign the verdict agreed upon by the jury. You are not, of course, to discuss this case with anyone except among yourselves, not even the marshal.

If, at any time during your deliberations, you wish to ask a question, have the foreman write the question down and call the marshal and send it to me, and I will consult with the lawyers, and if we can answer the question, we will be glad to do it. In any event, we will give you an answer.

If your deliberations take you into the lunch time and you feel that you would like to have lunch, tell the marshal and he will arrange either to bring a meal to you or take you down into the dining room for lunch. Whatever your pleasure is, the marshal will [14] take care of it.

You may now go with the marshal, but I do not want you to begin your deliberations. We will send you the exhibits and the verdict form. We will be a very short time, and they will be delivered to you shortly. Don't begin to do anything yet, except getting yourselves settled comfortably and we will send you word.

The alternate juror is excused with the thanks of the Court. You may stay around for the verdict or you may go. Thank you very much.

(Jury out.)

Gentlemen, I will hear objections to what I gave and what I failed to give. Do not leave out anything you wish to object to, but be brief as you can. I think the Court of Appeals might be interested in hearing what you say, at least on what I should have given and what I should not have given.

If you're going to say that I should have given numbers so and so, make sure that the clerk gets a copy, and I direct the clerk to put those into the record so that the Court of Appeals will be able to see what you objected to. If you do not have copies, I will lend you what you have sent me.

MR. MORRISON [Plaintiff Trinity's counsel]: Your Honor did give a general instruction on consent to a contract and did also give [15] a general instruction about offer and acceptance but failed to give Proposed Jury Instruction No. 6. The objection that I have to Your Honor's instruction about offer and acceptance is that it confuses the duties as to consent to a contract with a number of the other issues. Reading from Your Honor's charge, the law recognizes that a complete contract results when one of the parties makes an offer or proposal embodying all of the terms to be agreed upon by the parties and the other accepts it. If Your Honor please, the law of Louisiana is that if a party wants to include a restriction for limitation of his offer, then he must include that in the written offer. That is our Proposed Jury Instruction No. 21.

THE COURT: Now, Mr. Morrison, make sure that that gets into the record. In your argument, you can read it or you can paraphrase it, but make sure it gets into the record.

MR. MORRISON: To paraphrase it, it provides that when a party, such as Falstaff, makes an offer in writing and the offer is accepted, then that party who made the written offer will not be allowed to claim that it includes any restriction or limitation, such as no contract will result until the execution of a formal written sublease,

unless said restriction or [16] limitation is specifically set out in the offer.

So, if Falstaff had wished to limit or restrict their offer to such as a 30-year term issue, then they had the obligation to state that in their offer. The law of Louisiana would not allow a party to say what a writing means other than what the writing says.

Additionally, in your instructions insofar as offer and acceptance are concerned are the duties of how one determines consent, and I was concerned to see that when Your Honor, on Page 7, gave the instruction that consent is the thing which is in dispute here, Your Honor then immediately followed that up with the jury instruction that consent is determined by one party getting an offer which another party accepts, and that that term "consent" was more or less left undefined in your jury instructions. Consent was never defined. And the reason why I think that is very important is that consent must necessarily defined in the duties of offer and acceptance. As we, in our jury instructions, Request No. 6, we specifically pointed to that fact.

Now, Instruction No. 7 is that the jury can, without being instructed so, does not have the foggiest idea of what consent is. It can get the impression [17] that it is a one-sided condition that is not expressed, such as the 30-year business, etc., etc., that that limits consent because it was not expressed. This is why I felt that the term "consent" should have been defined immediately thereafter, after the terms of offer and acceptance.

Now, moving down the page, on Page 7, I object to the jury instruction. You had given three general jury instructions as to the distinction between enforcible and unenforcible.

Now, starting off with the first instruction, if you will take them both together, the distinction is pointed, the first one is the part of the bargaining, I think, a part of the bargain, that the contract shall be reduced to writing in a formal written lease to perfect it, and in the

second jury instruction you say is the part of the bargain or is the contract to merely evidence the agreement.

In the first place I object to is the part of the bargain. Those are in 1840 terms. We are in 1976 now. I think the jury should properly be instructed on this issue. The purpose of the instruction is not to confuse but rather to enlighten the jury as to the law, and when you use 1840 terms, you certainly may confuse the jury. You must use [18] terms that the jurors can understand and not risk any possible confusion. Hence, my objection to the Court saying a part of the bargain is that the contract will be perfected only in writing. I think the Court should have said, as was stated in Reimann Construction vs. Heinz, at 137 So. 355, if you agree to reduce the contract to writing and further agree that the contract shall not be effective until reduced writing, then it is not an enforcible contrast. The Court stated this very clearly in two fashions. It pointed out to be reduced to writing and further agreed. This is the distinction that I wished that the Court would have made in the jury instructions. And this will be shown in our Proposed Jury Instruction No. 17, which we will attach to the record.

Now what I have said here regarding the last paragraph of instructions, beginning Page 7, also applies to the first paragraph on Page 8. Your Honor was tying the two together as a part of the bargain. I think they should have been tied together in 1976 terms, however, and further agree that the contract would be effective if reduced to writing.

I had another jury instruction, which is my Jury Instruction No. 11, in which we requested that the jury be instructed that when a party such as [19] Falstaff makes an offer to contract and he uses therein words of art or special meaning, then those words will be interpreted to have that special meaning, and the offering party will not be allowed to claim that they do not have the special meaning which he knew they would be taken to have. Now that is a very, very important instruction

as far as the witness, Mr. McClellan, who is a lawyer and uses words such as offer, acceptance, proposal and the like. Those are terms of art to a lawyer, and I think an instruction should have been given in that regard.

Another instruction which was requested was that the jury be instructed that it is perfectly legal and perfectly enforcible for parties to agree to a whole series of terms but simply agree that they will be shown as another document. This is a very clear situation which is involved in this case, and I think the jury should have been told that was a legal and proper method of proceeding. That it is legal and proper to agree on a series of terms which may involve changes, and that these items will be provided each order. That was my Jury Instruction No. 10.

Additionally, we offered a jury instruction that if the offering party made an ambiguous offer, an offer which can be ambiguously determined in two [20] ways, then the law is that the ambiguity must be determined in favor of the accepting party and against the party who has written the offer. Specifically it states that when a party makes a written offer which is accepted and the offer is ambiguous as to whether or not it includes a limitation or a restriction, such as a restriction that any contract was dependent upon the execution of a formal written sublease, then that ambiguity was be construed against the party making the offer. In this case it was Falstaff. Your Honor, this was my instruction, Request No. 22.

The next issue, if Your Honor please, is on Page 9 of Your Honor's instruction, where Your Honor listed what the jury may consider in determining the intent of the parties. I think this was directed more to the written contract issue. I had asked that the jurors be instructed that they may not only take into consideration these items, but we had a very specific and important item that we wanted the jurors to take into account, and that was the manner in which the parties expressed themselves in their writing, and Your Honor further stated

that you may consider the prior dealings and contracts between the parties, the size and value of the proposed lease, and whether the [21] defendant considered or believed that the contract or sublease could not be perfected unless and until the written consent of the property owner, Broad Street, was obtained to demolish existing buildings on the property to be subject to the lease, etc., etc.

Now, next, if Your Honor please—

MR. MOLONY: If Your Honor please, I may be in error in making this request, and please tell me so if I am, but it strikes me that the comments of Mr. Morrison on the written jury instructions that he is giving you at this time will be in the record and his comments are superfluous. If he appeals, based upon your jury instructions, he will be writing a brief saying in this brief what he is arguing to you now. All of this may be very well, but I feel that what he is doing at this time is keeping the jury from deliberating, and we think that there is an element of time involved here.

THE COURT: You could be a little briefer, Mr. Morrison. You are arguing your case. However, I think you are finished now, aren't you?

MR. MORRISON: Only one more point. I have to do this for the record so that the appellate court will know if I appeal on the instructions.

THE COURT: That's right, but you can also [22] be brief and not argue.

MR. MORRISON: Finally, our Instructions No. 25, 26, 27, 28, and 29, which were not given. I will put them all in. The one I'm most concerned about—I'm concerning about them all, but I'm most concerned about Mr. Schonekas who took the stand and testified that it was his legal opinion that Mr. Jung had approved, and then Mr. McClellan comes along and testifies, over my objection, and was more or less to balance out the fact that Mr. Schonekas testified, and nobody objected to Mr. Schonekas' opinion, but over my objection Mr. McClellan was allowed

to testify that it was his opinion that Mr. Jung would have approved any documents under any circumstances, and Your Honor let that in on the basis that you would ultimately instruct the jury under what circumstances Mr. Jung had to approve the documents and under what circumstances, and Your Honor has never done that. That is a massively important issue in this case, and Your Honor has not done that. I had given a string of jury instructions regarding what Falstaff could and could not claim about the Jung issue.

Thank you.

MR. NORTH: Your Honor, we have no objections to the instructions as given. We only would object, [23] at this time, with respect to our Proposed Jury Instructions, 3, 4, 5 and 6, which I will give to the court reporter and state that they should have been given to the jury. Those instructions deal with the question of consent. Jury Instruction No. 3 would have amplified the law dealing with the question of consent; Instruction No. 4 dealing with offer and acceptance, more particularly because of the conditions which Your Honor decided was not to be an issue in this case, and which we feel should have been an issue, and objected to. Those proposed instructions were based upon Louisiana Civil Code 1805. And Proposed Jury Instruction No. 5 dealt generally with what constitutes a contract of lease, and the fact that a lease agreement shall not affect the rights of a sublessee of an original lessee, setting forth in greater explanation the fact that the lessee's rights are not the same as the owner's rights with respect to the improvements, and we have three citations there in support of that instruction. I believe it's self-explanatory, if the Court pleases.

Now, our Proposed Jury Instruction No. 6 again discusses the question of conditions that any contracting party may impose, whatsoever, any conditions that he sees fit, and that when such lease would [24] impose substantial obligations on the parties, that it should be reduced to

writing, and this is supported by case law in Blauschild vs. Rockhold, 7 La. Appeals, 709, and Mire vs. Haas, 174 So., 374, and more recently our Louisiana Civil Code 1761.

At this time, I would offer these instructions in full. They are numbered, if the Court please.

THE COURT: Make sure they get into the record.

Now, take the jury verdict forms into the jury and tell them to begin their deliberations.

(Recess.)

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